EXHIBIT V-5-Q

TO THE DECLARATION OF SCOTT R. MOSKO IN SUPPORT OF DEFENDANTS CAMERON WINKLEVOSS, TYLER WINKLEVOSS AND DIVYA NARENDRA'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION PURSUANT TO FED. R. CIV. P. 12(B)(2), OR IN THE ALTERNATIVE MOTION TO STRIKE MOVING DEFENDANTS' NAMES FROM THE SECOND AMENDED COMPLAINT (DKT. NO. 137)

Dockets.Justia.com

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

THEFACEBOOK, INC.

Plaintiff,

vs. CASE NO. 105 CV 047381

CONNECTU LLC, CAMERON WINKLEVOSS, TYLER WINKLEVOSS, HOWARD WINKLEVOSS, DIVYA NARENDA, AND DOES 1-25,

Defendants.

/

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DEPOSITION OF MARK ZUCKERBERG

April 25, 2006

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REPORTED BY: LAWRENCE PAUL NELSON, CSR 12144

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BE IT REMEMBERED that, pursuant to Notice of Taking Deposition, and on April 25, 2006, commencing at the hour of 10:13 a.m. thereof, at 3300 Hillview, Palo Alto, California, before me, LAWRENCE PAUL NELSON, CSR No. 12144, duly authorized to administer oaths, there personally appeared

MARK ZUCKERBERG,

called as a witness by the Defendants, and who, being first administered an oath, was thereupon examined and testified as hereinafter set forth.

THE VIDEOGRAPHER: Good morning. This 10:13:35
marks the beginning of volume 1, videotape 1 in the 10:13:37
deposition of Mark Zuckerberg in the matter of 10:13:42
TheFacebook, Inc. versus ConnectU, et al, in 10:13:46
Superior Court of the State of California, County of 10:13:54
Santa Clara, Case No. 105 CV 047381. Today's date 10:13:58
is April 25th, 2006, and the time is 10:14 a.m. 10:14:07
The location of this deposition is the 10:14:14
offices of Finnegan, Henderson, Farabow, Garrett & 10:14:17
Dunner, 3300 Hillview, Palo Alto, California. 10:14:24
The deposition was noticed by attorneys for 10:14:29
the defendants and the videotape is being produced 10:14:34
on behalf of the same. 10:14:36
The video operator is Marguerite Howell, a 10:14:39

Q. This document was filed with the Superior 17:25:46
Court of the State of California on August 17th, 17:25:52
2005. If you'll turn to paragraph 1 in the second 17:25:54
page of the document. 17:26:00

MR. GUY: Do you have an extra copy? 17:26:08

MR. MOSKO: I might. You were serious 17:26:11
about throwing the document in the water. 17:26:22

BY MR. MOSKO: 17:26:31

Q. All right. Paragraph 1 that says, the 17:26:32
second sentence of paragraph 1 says, "The 17:26:36
TheFacebook operates all of its servers in 17:26:41
California." Do you see that? 17:26:43

A. Yes. 17:26:45

Q. Does that refresh your recollection as to 17:26:45
when Facebook stopped using the servers at Savvy? 17:26:47

A. No. I mean this is August 2005. We had 17:26:51
stopped using the servers from Savvy well before 17:26:57
then. I think that the best document that you have 17:27:00
for that is that e-mail where -- which said that the 17:27:03
Savvy servers had been off for two months in January 17:27:07
so we definitely had stopped using them by the time 17:27:11
they were turned off. 17:27:14

Q. Okay. Paragraph 11, please. 17:27:15

A. Did you want me to read through this? 17:27:48

Q. You know what, that's a good idea. Why 17:27:50

don't you do that? 17:27:56

MR. GUY: How much longer do we need to go, 17:27:58
Counsel? 17:28:01

MR. MOSKO: I still have several questions. 17:28:02
What do you want to do? 17:28:04

MR. GUY: Are we almost done? 17:28:06

MR. MOSKO: I don't know what "almost" 17:28:07
mean. As I said I thought I had between an hour and 17:28:09
two hours when you asked me before. 17:28:13

MR. GUY: And where are we now? 17:28:16

MR. MOSKO: Could be better than an hour, 17:28:18
depends on his answers to some of these questions. 17:28:20
What do you want to do? 17:28:23

MR. GUY: Well, I tell you what. We'll let 17:28:24
you go for another 10 minutes but it's not going to 17:28:24
be another hour. I think you spent most of the day 17:28:27
doing something that has nothing to do with this 17:28:30
case so we consider the deposition will be closed in 17:28:32
another 10 minutes. 17:28:35

MR. MOSKO: Okay. We'll agree to disagree 17:28:37
on that. I'll ask questions for 10 minutes. 17:28:39

THE WITNESS: Okay. So I've read to 11. 17:29:13

BY MR. MOSKO: 17:29:18

Q. Okay. Do you understand what the phrase 17:29:18
"in order to legally access users profiles" means? 17:29:24

MR. GUY: May call for a legal conclusion 17:29:33
but he can testify to his understanding. 17:29:35
THE WITNESS: I mean I think that that 17:29:40
means in order to access users profiles without 17:29:42
breaking the law. 17:29:45
BY MR. MOSKO: 17:29:47
Q. And do you have an understanding of what 17:29:48
law is referred to in this paragraph? 17:29:50
MR. GUY: Calls for a legal conclusion. 17:29:58
Answer if you know. 17:30:00
THE WITNESS: The use of the site is 17:30:03
governed by the terms of use. You agree to the 17:30:06
terms of use by using the site. The terms of use 17:30:09
probably states that you have to sign in and 17:30:13
register in order to use the site, that you can't 17:30:16
use it commercially or by any other use. 17:30:19
BY MR. MOSKO: 17:30:23
Q. And do you have any information to support 17:30:23
the last sentence in that paragraph that says, 17:30:28
"During and all relevant times defendants were aware 17:30:31
of the policies referred to"? 17:30:34
A. Well, by registering for the site there's 17:30:40
a link right there that says, "Check this if you 17:30:47
have read and agree to the terms of use." So by 17:30:51
registering for the site, they have. 17:30:54

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Q. And did that box to check exist at all times since TheFacebook has operated? 17:30:59 17:31:07
A. Yes. I mean there's also a link to the "terms of service and privacy," on every page of the site. 17:31:12 17:31:20 17:31:22
Q. Paragraph 15 says, "TheFacebook also restrict access to and has always used it best efforts to keep confidential its aggregate customer lists." What does that mean if you know, aggregate customer lists? 17:31:26 17:31:31 17:31:34 17:31:40 17:31:44
A. So I believe what they're talking about there is that this site is made in such a way that you can get access to a person's profile or search for someone, but it's made explicitly to prohibit you from being able to go through and access everyone's profile or everyone's information. So by that I mean both that you can't see everyone on the site, you can only see the profiles of your friend and people at your school, and I also mean that you can't go through even to everyone at your school and access all of their information. Facebook will block you from doing that. 17:31:44 17:31:47 17:31:54 17:31:57 17:32:00 17:32:03 17:32:06 17:32:10 17:32:12 17:32:15 17:32:18 17:32:23
Q. Has that been true since it began in February of 2004? 17:32:24 17:32:27
A. The former is true. The latter is -- has 17:32:28

THE WITNESS: I really don't understand 17:33:47
what that question's asking. 17:33:48
BY MR. MOSKO: 17:33:50
Q. Do you understand that Facebook has 17:33:51
accused the defendants in this case of accessing 17:33:56
e-mail addresses found on Facebook? 17:34:01
A. Yes. 17:34:06
Q. When did Facebook first conclude that the 17:34:09
defendants were accessing e-mail addressing on 17:34:22
Facebook? 17:34:31
A. It first occurred to me that they were 17:34:33
doing this when I received an e-mail that was 17:34:35
generated automatically by ConnectU, on behalf of 17:34:39
someone I knew and the e-mail said that this person 17:34:44
had imported all their friends from Facebook to 17:34:48
ConnectU using Connect U's social butterfly service. 17:34:53
So at that point I went to ConnectU to see what this 17:34:57
was and I mean the only way that that could have 17:35:00
happened was if they looked through that person's 17:35:03
friends and got all their e-mails and then e-mailed 17:35:07
all of them. 17:35:10
Q. So you said you went to ConnectU, what did 17:35:11
you mean by that? You went to the web site? 17:35:15
A. Yeah. 17:35:16
Q. And you said when you received an e-mail 17:35:21

on behalf of someone that you knew, who was that 17:35:26
person? 17:35:30
A. I don't remember exactly. This is a while 17:35:30
ago. 17:35:33
Q. And what did you do as a result of your 17:35:34
discovery? 17:35:37
A. Well, immediately I went to ConnectU and 17:35:42
saw what they were doing, and then I modified 17:35:46
something on Facebook to block this from working. 17:35:50
So -- 17:35:55
Q. Sorry. Goo ahead. 17:35:55
A. So they were running a program that would 17:35:56
take someone's users information for Facebook and 17:36:00
then log in, and then go through and scrape 17:36:03
everyone's e-mail addresses off of Facebook who were 17:36:06
that person's friends. So in order to stop that 17:36:10
from happening, I just put into TheFacebook code to 17:36:15
block that program from loading Facebook pages. 17:36:17
Q. When did you first discover -- make this 17:36:22
discovery? 17:36:26
A. I don't know the exact date. 17:36:26
Q. Approximately? 17:36:28
A. I think it was early 2005, maybe like late 17:36:30
January, perhaps. 17:36:45
Q. Okay. Paragraph 21 says, "As a result of 17:36:47

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these incidents of unauthorized access and 17:36:51
unauthorized appropriations by defendants 17:36:57
TheFacebook was damaged." Do you see that? 17:37:00

A. Yes. 17:37:02

Q. How was Facebook damaged? 17:37:03

A. Well, there are a bunch of ways. One is 17:37:05
that as an information resource, people need to feel 17:37:09
like they have control over what they're putting up. 17:37:12
So -- and people are very sensitive about sharing 17:37:16
their e-mail address or cell phone because they 17:37:21
don't want to get spammed or harassed, and one of 17:37:23
the reasons why Facebook -- why people felt 17:37:25
comfortable of sharing on Facebook is because they 17:37:29
have very good, we have very good privacy control 17:37:31
that let people control who they share that 17:37:31
information with. 17:37:31

But ConnectU in making this program 17:37:36
basically made something that was going to go 17:37:41
through and find e-mail addresses and spammed all 17:37:43
these people. So not only did that effect our users 17:37:46
negatively but it decreases their trust in us. It 17:37:50
probably encouraged people to like share less 17:37:54
information and it was our property that they were 17:37:56
using to like spammed people and get them to go to a 17:38:00
competing web site with us. A web site that was 17:38:06

competing with us. 17:38:08

Q. What evidence do you have that it 17:38:09
decreased your users's trust in you? 17:38:11

A. I don't know. 17:38:17

Q. And what evidence do you have that it had 17:38:23
an effect on Facebook? 17:38:25

A. I mean there were probably -- I would 17:38:36
guess but I don't know, that like people notice when 17:38:42
they're getting spammed and that makes them less 17:38:47
trustful of it. But the effect it had on Facebook 17:38:51
was largely that like our property had been 17:38:54
essentially broken into and was being used to fuel 17:38:58
competing web site. 17:39:02

And then I had to take along with Dustin or 17:39:03
four days of my time to block them from doing this. 17:39:06
Because after I originally stopped their program 17:39:09
from running, they went back and modified it to make 17:39:12
it run again, and then we had to block that and that 17:39:14
kept on going on. 17:39:18

Q. You're not aware of any users who dropped 17:39:20
out of Facebook as a result of this activity, are 17:39:23
you? 17:39:27

A. Any individual users? 17:39:29

Q. Yes. 17:39:30

A. I can't point to any specific one but that 17:39:31

doesn't mean that there weren't any. 17:39:34
Q. Are you aware of any loss of advertising 17:39:37
dollars that you suffered as a result of this 17:39:40
activity? 17:39:44
A. It's hard to quantify that because this 17:39:46
isn't a short-term thing. If an event likes this 17:39:48
happens and our users get spammed then they trust 17:39:51
the site less and they use it less, then that could 17:39:54
affect us tremendously down the line, even if it 17:39:58
doesn't affect it right at that point. 17:40:02
Q. Are you aware of any effect whatsoever? 17:40:04
A. It's immeasurable. How would I know what 17:40:08
we'd be doing now if I didn't have to take some 17:40:10
amount of time to fix this and a bunch of our users 17:40:11
hadn't been spammed to go to this other sites. 17:40:14
Q. So you're not aware of any advertiser 17:40:17
saying as a result of what the defendants are 17:40:19
alleged to have done were not going to buy 17:40:21
advertising on your site, are you? 17:40:25
A. I don't think it would happen like that. 17:40:29
I mean that's not the damage that we're alleging. 17:40:32
Q. What damage are you alleging? 17:40:35
A. I mean we're saying that because this 17:40:37
happened, it like -- it could at some point decrease 17:40:41
the value or decrease the people who advertised on 17:40:44

C E R T I F I C A T I O N

I, LAWRENCE PAUL NELSON, duly authorized to administer oaths pursuant to Section 2093(b) of the California Code of Civil Procedure, do hereby certify: That the witness in the foregoing deposition was administered an oath to testify the truth in the within-entitled cause; that said deposition was taken at the time and place therein stated; that the testimony of the said witness was reported by me and was thereafter transcribed under my direction into typewriting; that the foregoing is a complete and accurate record of said testimony; and that the witness was given an opportunity to read and correct said deposition and to subscribe the same.

Should the signature of the witness not be affixed to the deposition, the witness shall not have availed himself/herself of the opportunity to sign or the signature has been waived.

I further certify that I am not of counsel nor attorney for any of the parties in the foregoing deposition and caption named nor in any way interested in the outcome of the cause named in said caption.

DATED: May 4, 2006

Lawrence Paul Nelson

LAWRENCE PAUL NELSON, CSR NO. 12144